



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2005

Ms. Sue Ann Gregory
Assistant Criminal District Attorney
Bexar County Civil Division
300 Dolorosa, Suite 4049
San Antonio, Texas 78205

OR2005-00718

Dear Ms. Gregory:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 217579.

The Bexar County Purchasing Department (the "department") received a request for notes from a specified meeting; "monthly, quarterly, semi-annual or yearly accumulation of Department statistics of individual production or other performance indicators for all workers in the department," as well as "production or other performance indicators accumulated at the Department level for 2003 and 2004"; and ages or birth dates for all department employees. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted documents include completed reports, which we have marked. As prescribed by section 552.022, the department must release this information unless it is confidential under other law. Section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not qualify as other law that makes information confidential for the purposes of section 552.022. Thus, the department may not withhold the marked reports pursuant to section 552.103. As you raise no other exceptions to disclosure, we determine the department must release this information to the requestor.

With respect to the remaining submitted information, we address your claim under section 552.103. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental

body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You indicate that the requestor, an employee of the department, intends to appeal the department's response to her grievance to the Bexar County Civil Service Commission (the "commission"). You contend that the commission's grievance process constitutes "litigation," and you therefore contend that the remaining submitted documents are related to pending or anticipated litigation for purposes of section 552.103. This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.,* Open Records Decision Nos. 474 (1987), 368 (1983), 336, 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.,* Open Records Decision Nos. 588 (1991) (proceeding of former State Board of Insurance), 301 (1982) (proceeding of Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, and d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

In this case, you assert that commission "conducts fact-finding hearings and acts as a quasi-judicial body in reviewing disciplinary actions and determining the rights and benefits of Bexar County employees." However, you have not cited to any statute authorizing the commission to conduct quasi-judicial proceedings. While you indicate that contending parties may present testimonial and documentary evidence before the commission and may be represented by counsel, you do not inform us whether the commission conducts discovery or whether a record is made of the commission's proceedings. Furthermore, you do not indicate that the commission is an adjudicative forum of first jurisdiction, or whether a decision of the commission is reviewable by the district court on the basis of factual evidence rather than on solely an appellate basis. Thus, upon review of your comments and the submitted information, we find you have failed to establish that the commission's employee grievance procedures constitute "litigation" for purposes of section 552.103. We therefore have no basis to determine that the commission's proceedings are conducted in a quasi-judicial forum, and we consequently have no basis to determine that the department was a party to litigation or reasonably anticipated litigation at the time the department received the present request. We determine the remaining submitted documents are not excepted from

disclosure under section 552.103 of the Government Code. As you raise no other exceptions to disclosure for this information, we conclude the department must release the information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

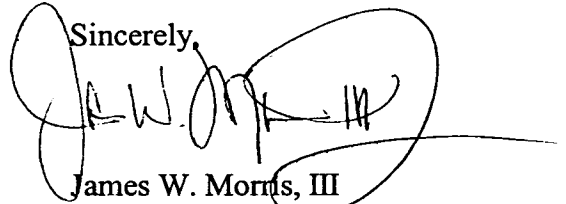
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", is written over a large, loopy circular flourish.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/DRS/sdk

Ref: ID# 217579

Enc: Submitted documents

c: Ms. Beverly Jones
Contract Specialist
Bexar County Purchasing Department
233 North Pecos, Suite 320
San Antonio, Texas 78207
(w/o enclosures)